FSBM CTech Sdn Bhd v Technitium Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22NCC-1017 OF 2010
NALLINI PATHMANATHAN J
20 JANUARY 2012

Civil Procedure — Action — Claim for goods sold and delivered and services rendered — Whether plaintiff had proved its case — Whether defendant's case amounted to a bare denial

FSBM CTech Sdn Bhd ('the plaintiff'), a system integrator for healthcare, telecommunication and other industries, brought the instant action against Technitium Sdn Bhd ('the defendant') for monies owing in respect of goods sold and delivered and services rendered. The goods were supplied and services rendered to two of the defendant's clients — Telekom Malaysia Bhd ('TM') and University Malaya Medical Centre ('UMMC'). Under the TM project, the plaintiff supplied a remote digital subscriber line access multiplexer system ('RDSLAM') enabling the delivery of streamyx services to TM's customers. Under the UMMC project, the plaintiff installed and commissioned a total hospital information System for UMMC. The plaintiff was a wholly-owned subsidiary of FSBM Holdings Bhd ('FSBM') which indirectly held a 20% shareholding in the defendant company. The mode of operation between the parties — as was the case for both the RDSLAM and UMMC projects — was such that the defendant would procure the projects whilst the plaintiff would carry out the work and then invoice the defendant for the work done. Disputes between the parties over two projects arose after FSBM ceased to have a shareholding in the defendant company. The defendant denied the plaintiff's claim and counterclaimed jointly against the plaintiff and FSBM claiming that it had, in the case of the RDSLAM project, overpaid the plaintiff and, in the case of the UMMC project, paid for non-performance, late delivery and maintenance charges for which the plaintiff should be responsible. The plaintiff's case was that despite the defendant having received full payment from both TM and UMMC in respect of the projects, which, in itself, showed the work had been satisfactorily done, the defendant had failed to pay the plaintiff under their 'back-to-back' arrangement.

Held, allowing the claim:

(1) The evidence showed the plaintiff had not been paid in full for goods supplied and services performed. The numerous admissions, in relation to audited accounts and financial statements, estopped the defendant from contending otherwise (see para 175).

(2) The defence witnesses were unable to point to any instance of non-performance of works or non-delivery of goods in relation to the plaintiff's claim. Apart from a general and bare denial to the claim, the defendant did nothing. At all times the defendant sought a discount from the plaintiff, rather than challenging the veracity of its claim as it now sought to do. It put the plaintiff to full proof of its claim which the plaintiff did by providing detailed invoicing with supporting documentation (see para 177).

(3) A significant feature that supported the claim and failed to lend credence to the counterclaim was the fact the third party customers who had employed the defendant had paid in full (save for LAD claimed by UMMC) for works done by the plaintiff. The contract between the plaintiff and defendant envisaged all monies received by the defendant were to be remitted to the plaintiff on a back-to-back basis. This was not done. There was no explanation from the defendant as to the whereabouts of these monies (see para 153).

(4) The counterclaim was misconceived, had no substantive basis and was not proven (see para 181).

[Bahasa Malaysia summary

FBSM CTech Sdn Bhd ('plaintif'), suatu sistem integrasi untuk penjagaan kesihatan, telekomunikasi dan industri lain, memulakan tindakan ini terhadap Technitium Sdn Bhd ('defendan') untuk wang yang dihutang berkaitang dengan barangan yang dijual dan serahkan dan perkhidmatan yang diberikan. Barangan tersebut yang dibekalkan dan perkhidmatan yang diberikan kepada dua pelanggan defendan — Telekom Malaysia Bhd ('TM') dan Pusat Perubatan Universiti Malaya ('PPUM'). Di bawah projek TM, plaintif membekalkan sistem *remote digital subscriber line access multiplexer* ('RDSLAM') yang membolehkan penghantaran perkhidmatan streamyx kepada pelanggan-pelanggan TM. Di bawah projek PPUM, plaintif memasang dan membuat tempahan sistem Total Hospital Information kepada PPUM. Plaintif adalah anak syarikat milik penuh FSBM Holdings Bhd ('FSBM') yang secara tidak langsung memegang 20% pegangan saham dalam syarikat defendan. Cara operasi di antara pihak-pihak — yang digunakan bagi kedua-dua projek RDSLAM dan PPUM — adalah bahawa defendan akan memperoleh projek-projek manakala plaintif akan menjalankan kerja dan kemudian menginbois defendan bagi kerja yang dilakukan. Pertikaian di antara pihak-pihak mengenai dua projek timbul selepas FBSM tidak lagi memegang saham syarikat defendan. Defendan menafikan tuntutan plaintif dan menuntut balas bersama terhadap plaintif dan FSBM dengan menyatakan bahawa ia telah, di dalam kes projek RDSLAM, terlebih bayar plaintif dan, di dalam kes projek PPUM, telah membayar bagi kegagalan pelaksanaan, penghantaran lewat dan caj penyelenggaraan yang plaintif perlu bertanggungjawab terhadapnya. Kes plaintif adalah bahawa walaupun

defendan telah menerima bayaran penuh daripada TM dan PPUM berkaitan dengan projek-projek tersebut, yang dengan sendirinya, menunjukkan kerja tersebut telah diselesaikan dengan memuaskan, defendan telah gagal membayar kepada plaintif di bawah perjanjian 'back-to-back' mereka.

Diputuskan, membenarkan tuntutan:

(1) Keterangan menunjukkan bahawa plaintif tidak pernah dibayar sepenuhnya bagi barangan yang dibekalkan dan perkhidmatan yang diberikan. Sejumlah pengakuan, berkaitan dengan akaun-akaun yang diaudit dan penyata-penyata kewangan mengestop defendan daripada menghujah sebaliknya (lihat perenggan 175).

(2) Saksi pembelaan tidak mampu menunjukkan apa-apa contoh kegagalan pelaksanaan kerja atau ketidakpenghantaran barangan berkaitan dengan tuntutan plaintif. Selain daripada penafian umum dan kosong kepada tuntutan tersebut, defendan tidak berbuat apa-apa. Pada setiap masa, defendan memohon diskaun daripada plaintif, dan bukannya mencabar kesahihan tuntutannya seperti yang dipohonnya sekarang. Plaintif perlu membuktikan sepenuhnya tuntutan plaintif dengan memberikan invois yang terperinci dengan dokumen-dokumen sokongan (lihat perenggan 177).

(3) Salah satu ciri yang menyokong tuntutan dan gagal memberikan sokongan kepada tuntutan balas adalah fakta bahawa pelanggan pihak ketiga yang menggaji defendan telah membayar sepenuhnya (kecuali LAD yang dituntut oleh PPUM) bagi kerja-kerja yang dilakukan oleh plaintif. Kontrak di antara plaintif dan defendan membayangkan kesemua wang yang diterima oleh defendan akan diberikan kepada plaintif atas dasar berturut-turut ('back-to-back'). Ini tidak dilakukan. Tidak ada penjelasan daripada defendan mengenai ke mana hilangnya wang ini (lihat perenggan 153).

(4) Tuntutan balas tersebut adalah salah tanggap, tidak mempunyai asas yang substantif dan tidak dibuktikan (lihat perenggan 181).]

Notes

For cases on claim for goods sold and delivered, see 2(1) *Mallal's Digest* (4th Ed, Reissue) paras 74–75.

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)

Johnson v Kershaw (1847) 63 ER 1059 (refd)

KM Quarry Sdn Bhd v Ho Hup Construction Company Bhd [2006] 7 MLJ 203; [2006] 1 LNS 297, HC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (distd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 CLJ 529, FC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Legislation referred to

Evidence Act 1950 ss 32(1)(b), 90A

Wong Rhen Yen (Vincent Lim with him) (Dennis Nik & Lim) for the plaintiff.
KS Narayanam (T Gunaseelan with him) (Gunaseelan & Associates) for the defendant.

Nallini Pathmanathan J:

[1] The plaintiff in the original action, FSBM CTECH Sdn Bhd ('the plaintiff') makes claim against the defendant in the original action,Technitium Sdn Bhd ('the defendant') for monies due to it in respect of goods sold and delivered and services rendered to the defendant, together with reimbursements, interest and costs. The plaintiff's claim as at 16 April 2010 is that the defendant was indebted to it for a total sum of RM32,409,434.77 for the provision of services and goods. The particulars are set out in eight separate annexures to the statement of claim. These annexures contain the requisite invoice details in support of the plaintiff's claim.

[2] The plaintiff is a system integrator for healthcare, telecommunication and other industries. In essence the entirety of the plaintiff's claim is for goods supplied and services rendered in respect of two major projects. The first project relates to an award by the defendant to the plaintiff for the supply of a remote digital subscriber line access multiplexer system ('RDSLAM') project which entailed the provision of services to the defendant's client, namely Telekom Malaysia Bhd. RDSLAM is a network device located in telephone exchanges to enable the delivery of streamyx services to Telekom's customers. This first project is known as the RDSLAM project.

[3] The second project relates to an award by the defendant to the plaintiff for a project to supply, deliver, install, test and commission a total hospital information system (THIS) at University Malaya Medical Centre, known as the UMMC project. Here the defendant's client was University Malaya Medical Centre.

[4] The plaintiff provided the requisite goods and services for the RDSLAM and UMMC projects to the defendant's clients as required vide two letters of

award granted to the plaintiff by the defendant dated 3 August 2005 and 28 April 2006 respectively. It is these two letters of award that comprise the basis for the contractual relationship between the plaintiff and the defendant. These letters of award set out the terms agreed between the parties in relation to the provision of the requisite goods and services.

[5] The plaintiff maintains that having provided such goods and services, and the defendant having received payment for the same from its clients, the defendant has failed, refused or neglected to make payments in the total sum of RM32,409,434.77 to the plaintiff.

[6] The defendant denies such liability. It maintains that the relationship between the plaintiff and it were more than a mere seller and purchaser of goods and services. It maintains that there was an arrangement between the plaintiff and its holding company, one FSBM Holdings Bhd ('FSBM') and the defendant, whereby the plaintiff controlled the defendant. FSBM owns the entire paid up capital of the plaintiff. The defendant would secure projects with the advice and guidance of FSBM where the defendant's role was that of project owner and client manager. However, the defendant contends that at all times FSBM had total management and financial control of the project so undertaken, and it or its subsidiary namely the plaintiff, would undertake the execution of the project. Accordingly the defendant maintains that the relationship between itself, the plaintiff and FSBM was not one of seller and buyer of goods and services, but one of partnership (an agreement dated 5 July 2007 was executed between FSBM and the defendant known as the 'appointment of principal business partner agreement' stipulating the terms of the agreement or relationship between FSBM and the defendant). The defendant further contends that the plaintiff is a conduit of FSBM for the purposes of undertaking the RDSLAM and UMMC projects.

[7] In respect of the RDSLAM project, the defendant pleads that it has overpaid the plaintiff by a sum of RM2,898,040.34, in excess of the agreed contractual sum of RM6,555,202. As for the UMMC project, the defendant contends that it has had to bear and paid for the costs of non-performance, late delivery and maintenance charges which should rightfully be borne by the plaintiff.

[8] Vide its counterclaim the defendant has claimed against the plaintiff and FSBM (they are the defendants in the counterclaim) the sum that was overpaid, as well as all other costs and expenses incurred. For the RDSLAM project the defendant seeks the sum of RM5,734,040.34 by way of counterclaim. And in respect of the UMMC project, the defendant claims the sum of RM10,422,776.89 as well as a sum of RM1,220,485 in respect of other projects.

[9] The plaintiff denies owing the defendant any of these monies and reiterates its original claim.

THE TRIAL

[10] The trial of this matter, somewhat regrettably, took place over a protracted period of time although the actual hearing subsumed six days. This was largely due to illness of counsel, a lack of mutually acceptable dates for continued hearing and some delay on the part of the defendant in narrowing down the issues and disputes in relation to the voluminous documentation produced in support of the plaintiff's claim.

[11] The plaintiff produced three witnesses at trial, namely Mr Phua Cheng Khan, PW1, a senior executive vice-president of FSBM, one Mr K Gunasagaran, PW2, the senior assistant director of UMMC and one Dato' Tan Hock San, PW3, a director of the plaintiff and the managing director of FSBM.

[12] The defendant produced three witnesses, namely Professor Emeritus Dr Azman bin Awang, DW1, a director of the defendant and until 26 March 2010, an executive director of FSBM. They also called one Mariana bt Ahmad Tahar, DW2, an accounts clerk with the defendant and Haliza bt Bidin, DW3, a director of the defendant and until 5 February 2010 an executive vice president of FSBM who had been seconded to the defendant. After that date, Haliza became an employee and continued as a director of the defendant.

BACKGROUND FACTS

[13] It is necessary to comprehend the background of the incorporation of the defendant and the relationship between the plaintiff, defendant and FSBM.

[14] On 10 April 1997, the plaintiff, a wholly owned subsidiary of FSBM was incorporated. One of the directors of the plaintiff was Dato' Tan Hock San ('Dato' Tan').

[15] On 14 May 2001 the defendant was incorporated.

[16] Some 78.8% of the shareholding of the defendant was held by one Dr Abu Hassan bin Ismail (of Universiti Teknologi Malaysia), and 20% by one Jaring Sekitar Sdn Bhd.

[17] Jaring Sekitar Sdn Bhd is a wholly owned subsidiary of FSBM.

Therefore FSBM initially held shares in the defendant through Jaring Sekitar Sdn Bhd. It acquired its shareholding in the defendant on 17 October 2003. On 15 December 2003, Dato' Tan was appointed a director of the defendant, as a corporate representative of FSBM. At this point in time he was also appointed a cheque signatory of the defendant's banking accounts.

[18] The balance 1.2% shareholding in the defendant was held by Haliza bt Bidin ('Haliza'). Haliza had joined FSBM as an accounts manager on 6 March 1992. She rose to the position of executive vice president of FSBM Holdings in February 2005. Haliza was therefore a senior employee of FSBM and a shareholder and a director of the defendant. She was appointed a director of the defendant on 28 August 2001.

[19] In or around 2004, Dr Abu Hassan bin Ismail, the majority shareholder of the defendant left and Professor Dr Azman bin Awang ('Prof Azman') took his place in the defendant at the invitation of Dato' Tan Prof Azman joined initially as an executive director and later acquired the shares previously held by Dr Abu Hassan. Prof Azman was appointed a director of the defendant on 10 March 2004. On 16 February 2006, Prof Azman was appointed the chairman of the RISK Committee of FSBM.

[20] In the same month, on 31 March 2004, Prof Azman joined FSBM as executive director. He was therefore, at all material times, a shareholder and director of the defendant, as well as an executive director of FSBM. On 16 February 2006, Prof Azman was appointed the chairman of the RISK Committee of FSBM. He resigned from these positions on 26 March 2010.

[21] In summary, the mode of operation adopted by the plaintiff and the defendant was that the defendant would tender for and procure projects and manage the client so procured. The plaintiff would carry out and implement the entirety of the works under each particular project very much like a subcontractor and invoice or bill the defendant for work done. In other words the plaintiff assumed the responsibility of carrying out and implementing the projects which had been secured by the defendant. The contract for the project would be signed between the defendant and the third party client and a subsequent award in relation to the work would be executed between the defendant and the plaintiff. This then was the modus adopted in respect of both the RDSLAM project and the UMMC project which comprise the subject matter of dispute in this case.

THE RDSLAM PROJECT

[22] On 27 July 2005 the defendant was awarded the RDSLAM project by Telekom Bhd. Soon thereafter, vide letter of award dated 3 August 2005, the

defendant entered into a contract with the plaintiff for the plaintiff to undertake and implement the works under the project. On 17 January 2006 a further letter of award was issued by the defendant to the plaintiff to revise the scope of works of the plaintiff under the RDSLAM project.

THE UMMC PROJECT

[23] On 8 April 2006 UMMC awarded the contract for the supply, delivery, installation, testing and commissioning of a total hospital information system (THIS) at University Malaya Medical Centre to the defendant. Soon after this, vide letter of award dated 28 April 2006, the defendant entered into a contract with the plaintiff for the plaintiff to undertake the scope of works relating to the UMMC project.

[24] The contract price for the UMMC project was revised by UMMC vide letter dated 20 June 2006, to the defendant.

[25] In or around 5 July 2007 Jaring Sekitar Sdn Bhd, the wholly owned subsidiary of FSBM which held 20% of the shareholding of the defendant, disposed of this 20% shareholding to Haliza. No payment was made for these shares. Haliza remained an executive vice president of FSBM.

[26] With the divesting of Jaring Sekitar's shareholding in the defendant, Dato' Tan ceased to be a director of the defendant as of the same date, ie 5 July 2007. On 23 November 2007, Dato' Tan ceased to be a bank signatory of the defendant's bank accounts.

[27] Disputes arose between the parties in relation to payments claimed to be due to the plaintiff from the defendant under the said projects. On 5 February 2010 Haliza exited FSBM and accepted employment with the defendant. On 26 March 2010, Prof Azman resigned as an executive director and chairman of the RISK Committee of FSBM. Prof Azman and Haliza, having left their positions in FSBM, and being in sole control of the defendant by this time, as the present directors and registered shareholders, issued a letter of termination to the plaintiff in respect of the UMMC project.

[28] However the plaintiff maintains that, despite the defendant having received payment from third party customers, ie Telekoms and UMMC for work done under this project, it has persistently failed or refused to forward the monies due to the plaintiff for the work it had undertaken under the two projects and some other miscellaneous projects.

CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANT FOR THE RDSLAM PROJECT

[29] As stated above vide letter of award dated 3 August 2005 the defendant

awarded the RDSLAM project to the plaintiff. This is not in dispute. The salient terms of the letter are reproduced below:

> (2) We are pleased to award the Project to FSBM as follows:
>
> (a) Supply of RDSLAM equipment and accessories amounting to an aggregate sum of RM6,005,819.00 (Ringgit Malaysia Six Million Five Thousand Eight Hundred and Nineteen Only) as set out in Appendix A;
>
> (b) Provision of Works in accordance to FSBM Services Rates as set out in Appendix B;
>
> (c) Payment terms will be on a back to back basis in accordance to Telekom's (TM) schedule of payment;
>
> (d) The effective date of this agreement shall be the date of this LOA, and the agreement period shall be two (2) years with an option to extend for another year, if required.

[30] It is evident from the foregoing that equipment and accessories were to be supplied by the plaintiff. Provision of works for the implementation of the equipment was also to be provided by the plaintiff at rates as specified in Appendix B to the letter of award. Payment to the plaintiff was to be effected by the defendant directly upon receipt of payment by the end client, Telekoms.

[31] Appendix A to the RDSLAM letter of award sets out a total of 34,944 ports to be delivered at a contract value of RM6,005,819. Appendix B sets out the service rates to be charged for the implementation of the project. As the defendant was then an associate company of the FSBM, the rates were discounted by 30%.

[32] The defendant vide letter dated 17 January 2006 revised the scope of the works of the plaintiff. The said letter redefined 'Works' as being the supply, delivery of RDSLAM equipment and the provision of manpower for installation and testing of equipment. In the original letter of award dated 3 August 2005, 'Works' had been defined as 'All those activities, processes and measures necessary and incidental to the execution and completion of the Project including the supply, delivery, installation, testing and commissioning of the RDSLAM equipment by FSBM pursuant to the terms of this LOA.'

[33] Apart from this variation the remaining contents of the letter of award of 3 August 2005 remained unchanged. In the course of trial, the defendant

raised an issue on this letter dated 17 January 2006 stating that the variation had not been approved by the defendant. Haliza maintained that she did not sign it and was not aware of the existence of this letter until the commencement of this action.

[34] The plaintiff's first witness, Phua Cheng Khan ('Phua') however advised during the course of cross-examination that he could confirm that the signature on the letter of 17 January 2006 belonged to one Rozali Salleh the then sales director of the defendant Haliza did not dispute this, adding however that Rozali, like herself had been seconded from FSBM to the defendant. It would therefore appear this second letter was validly issued on behalf of the defendant. In any event it would appear that for the purposes of this action which relates to disputes on items and services provided, the contract sum for the hardware to be delivered by the plaintiff and the rates chargeable by the plaintiff for services were not amended.

THE PLAINTIFF'S CASE

The evidence of Phua Cheng Khan, PW1 ('Phua')

[35] Although Phua is a senior executive vice president of FSBM, he oversees the four core businesses of the FSBM group, namely, systems and solutions business and healthcare business. This includes overseeing the subsidiaries of the group involved in these businesses which would include the plaintiff.

[36] Having explained the salient terms of the RDSLAM contract, Phua explained that the provisional sum set out in the letter of award of 3 August 2005 for supply of equipment was provisional because as the project was being implemented, Telekom the client of the defendant, requested for more equipment than that specified. While the award specified 34,944 ports the final number of ports delivered by the plaintiff to the defendant at Telekom's request was 57,392 ports.

[37] Phua then explained Appendix B before going on to explain how the defendant was billed for works done by the plaintiff under the RDSLAM project. It is relevant to note that the number of invoices produced in the bundles at trial ran to several hundred documents. In court no less than twenty bundles of documents containing in total hundreds of invoices were produced. It was not feasible to go through each of the invoices. The witness produced a flow chart showing the procedure adopted by the plaintiff in billing the defendant, to explain how billing was effected. The same modus was utilised for all invoices. The dates of the invoices ranged from May 2007 to December 2009.

[38] Phua explained that as and when Telekom required any of the items in the RDSLAM main contract, it would issue a letter of intent or LOI to the defendant. Upon receipt of the same, the defendant would forward a copy to the plaintiff. Thereafter based on the items in the LOI, the plaintiff would issue a purchase order to the manufacturers of the said items, mainly Datang Telecom Technology ('DTT') in China and other local suppliers. Phua gave an example of such a request from the exhibits in court.

[39] Phua then explained that the plaintiff would pay the supplier, DTT, or other local supplier in three tranches of 40%, 50% and 10%. The plaintiff then converted the payment made earlier to DTT from USD to RM and correspondingly invoiced the defendant at cost plus 3% with a 120 day credit term.

[40] Phua was asked whether the invoice value sought by the plaintiff in this action was in accordance with Appendix A in the letter of award whereupon he explained that it was in fact lower than that specified there. He explained that the total value of the plaintiff's claim for ports supplied is a balance of RM1,164,765.29 as specified in annexure 1 to the statement of claim. This was because the total claim was for the delivery of 57,392 ports at a contractual sum of RM9,863,952.70, of which the defendant has paid RM7,365,933.52.

[41] Phua also referred to the invoices and their supporting documents for the hardware which had been issued to the defendant as well as the invoices and supporting documents for the claim for reimbursements issued to the defendant.

[42] In the course of trial, given the voluminous number of invoices and the fact that it was not feasible to go through each and every one, I had directed the defendant to summarise its disputes on the claims of the plaintiff in tabular form, specifying the basis for the defendant's refusal to accept the same. The plaintiff was to then respond with an explanation on the same document, such that there would be an effective summarisation of the disputes in relation to the invoices.

[43] Accordingly exh CB21 was duly produced with the disputes of the defendant particularised and containing the attendant responses of the plaintiff. None of the disputes particularised in CB21 related to the RDSLAM project. They all related to the UMMC project. Learned counsel for the plaintiff, Mr Wong Rhen Yen therefore submitted that there was no effective complaint in respect of the provision of equipment and services for this project. However learned counsel for the defendant, Mr Gunaseelan objected to this and maintained that the defendant's stance had been clear from the outset,

namely that they disputed each and every invoice that had been produced in court. In short, Mr Gunaseelan maintained that the defendant sought formal proof of each and every invoice.

[44] Mr Gunaseelan submitted that the cross-examination of Phua revealed that he did not have personal knowledge of each of the invoices in respect of which the plaintiff made its claim. Phua, it was pointed out, had conceded that his evidence was based on the documents produced. In essence the defendant's thrust with regards to the invoices issued in respect of the RDSLAM project was that Phua had no personal knowledge of whether or not the work or equipment specified in each invoice had actually been supplied and delivered or the work done. Phua, as the senior executive manager of the plaintiff naturally could not be supposed to have personal knowledge of every item of equipment and services supplied by the plaintiff to the defendant. This encompassed the work of many employees, consultants, engineers etc. It was neither realisticor practicable to expect every person involved in the RDSLAM project to attend in court to verify the work done and the equipment supplied. As such when Mr Phua was asked in respect of any random selection of an invoice whether he had personal knowledge of precisely when the equipment specified there had been delivered, he explained that he did not and could not be expected to have such knowledge.

[45] This brings us to a central issue in this trial. The defendant maintained that the plaintiff had failed to prove its claim because it had not produced a witness who had full and personal knowledge of each and every disputed invoice. In answer to this, Mr Phua explained that the mode of billing the defendant, as set out above, ensured that:

(a) there was a request from the end-client, Telekom in the form of a LOI;

(b) the fact that the defendant approved and endorsed the provision of the equipment or service was borne out by the defendant forwarding the same to the plaintiff;

(c) the plaintiff acting on that LOI then expended its monies and expertise to procure the equipment from third party suppliers. This was duly documented by the Finance Department in the form of vouchers etc;

(d) the supplier was paid in instalments to ensure that the goods supplied were satisfactory and could be implemented and installed successfully. This too was documented in the records of the plaintiff in its Finance Department. Phua explained that upon verification of the receipt of supply of the equipment and delivery to the end-client Telekom for the project as well as installation, full payment would be made to the third party supplier in batches or instalments after which the defendant would be billed at a marked up cost of 3% as agreed under the letter of award;

(e) some payment was made by the defendant and the claim now relates to the balance sum due. It is pertinent that the RDSLAM project has been completed in full. The defendant was also paid in full by Telekom for the RDSLAM project as admitted by Haliza in the course of cross-examination. However it is in this context that the plaintiff makes claim for monies it alleges are due to it on a back to back basis;

(f) it is significant that there was no dispute by the defendant, until 2010 on the quantity of ports delivered by the plaintiff. Although the letter of award stipulates the contract value to be RM6,005,819 this was the sum assessed on the basis that 34,944 ports only were needed. As a matter of fact, 58,032 ports were finally supplied and delivered for this project. It follows therefore that the contract sum would also increase. The fact that there was no dispute about the supply of this quantity of equipment by the defendant itself during the material time, again supports the plaintiff's contention that its invoices are validly issued for equipment supplied. The defendant is in effect stopped from disputing the same at this very late stage;

(g) the defendant has failed to specify how or why these invoices are disputed notwithstanding that the project is complete and that it was the plaintiff that carried out all the work. It will be recalled that the defendant's role was purely to procure the contract and subcontract the same in its entirety to the plaintiff. The fact that the plaintiff and the defendant and FSBM were associate companies does not detract from the fact that in law they were separate corporate entities with a valid and subsisting contract between the plaintiff and the defendant; and

(h) on the issue of whether or not the maker of each invoice had to be produced, this begs the question of how many witnesses the defendant expected the plaintiff to produce to comply with the technical requirements of formal proof. It was suggested during cross-examination that the finance director of the plaintiff ought to have been called instead of Phua. However it is patently clear that the same objections would have been taken against the finance director who again would not have personal knowledge of the contents of each invoice. In reality no one person or even few persons could have such personal knowledge.

[46] The question in the instant case is whether the said equipment and services were indeed rendered. The plaintiff has met that challenge by producing all the requisite unpaid invoices relating to work done in this regard. It has also produced a witness who was involved in the process of endorsing or approving the issuance of bills to the defendant on the basis of a system of payment which ensured that the equipment had been fully supplied and the installation effected. The plaintiff points to the fact that there was no dispute about these invoices until this action. They also point to admissions by the

defendant in audit confirmations and proposals for settlement in support of their claim. As against this, the defendant maintains that the plaintiff's witness, Phua, does not have personal knowledge as to whether the equipment specified in the unpaid invoices were actually delivered to the project and implemented or installed successfully. Apart from this, no specific grievance or complaint is levelled or particularised in respect of any one invoice. It is a general complaint.

[47] It appears to this court that the plaintiff has indeed discharged the onus of proof that lies upon it, to establish that there is prima facie, a debt due and owing to it for equipment supplied and work done. This comes in the form of the oral evidence of a senior employee of the plaintiff who had a part to play in the general operational procedure that was adopted by the plaintiff in billing the defendant. The onus then passes to the defendant to establish why this prima facie evidence should fail. This could take the form of establishing either that specific goods were not supplied or that specified services were not effected. This however has not been done. The defendant points to the general body of invoices and maintains somewhat starkly, that it disputes the invoices in their entirety. Shorn of its technicalities, this amounts to a bare denial. In other words, in the face of considerable documentary evidence supported by the oral evidence of Phua and coupled with various admissions and part payments, the defendant contends that this evidence is insufficient or not credible. That in itself is insufficient to shift the onus of proof that has moved to it. The defendant has failed to discharge that onus. It must be made clear that I do not refer to the burden of proof which of course, at all times remains on the plaintiff. However the onus shifts from time to time with the adducing of evidence between the parties. Here the defendant has failed to meet or rebut that onus.

[48] The defendant submitted, inter alia, that Phua's evidence was inadmissible because he did not have personal knowledge and was hearsay. He relied, inter alia, on *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360. In that case the court relied upon the case of *Johnson v Kershaw* (1847) 63 ER 1059 where it was held that the evidence of an accountant relating to the results of his examination of certain partnership books was inadmissible because the accounts books themselves upon which he based his statement were not in evidence. Presumably in similar vein the defendant contends that Phua's evidence as a senior employee overseeing the finances of the plaintiff, is inadmissible because the rest of the supporting documents on which the invoices were issued were not available in court.

[49] With respect, the case cited is distinguishable because in the instant case, these goods and services were supplied at the behest of the defendant. The invoices in question were delivered to the defendant as the party liable to pay

the same. The defendant was the primary party to the contract with Telekom to ensure that all equipment and goods had been supplied. The defendant has also admitted through Haliza that payment in full has been received from the end client for the supply of equipment and services. In these circumstances it is wholly untenable for the defendant to insist on the proof of matters which are wholly within its knowledge and which it knows has been fully performed.

[50] In summary the fact that the defendant did not agree to dispense with formal proof cannot amount to a defence against the plaintiff's claim in all the circumstances of this case. In the instant case the plaintiff has produced the requisite invoices forming the basis for its claim. This is evident from the twenty or more bundles of documents adduced as exhibits. They have not simply produced a statement of accounts without a witness and sought to establish their claim. The invoices are not 'extracts' from the account books of the plaintiff but a documents which were issued to the defendant upon supply of the requisite goods and services.

[51] Further, it is evident from the evidence of Phua, that the invoices adduced as evidence in court were produced by the plaintiff in the ordinary course of its business. This was evident from the chart relied upon by Phua whereby he explained the manner in which the goods and services were procured, implemented or delivered and how the defendant was finally billed. It was submitted on behalf of the defendant that s 32(1)(b) could not be relied upon because Phua was an employee of FSBM and not the plaintiff. This too is not a tenable objection. In the first place, the plaintiff does not attempt to produce a statement made in the ordinary course of business in the absence of a witness. Phua explained that he oversaw the business and finance activities of the plaintiff. He was therefore aware of, and in fact responsible for the business and financial activities of the plaintiff. It is therefore entirely in order for a person having charge of the business and financial activities of the plaintiff to testify on its behalf as to the manner in which it conducted its business and the manner in which invoices were issued to the defendant for equipment supplied and work done. Section 32(1)(b) is simply not applicable.

[52] In all these circumstances I am satisfied that the defendant's contention of putting the plaintiff to strict proof has in fact been met by the plaintiff in the form of the evidence adduced in court. The evidence so adduced was admissible for the reasons I have enumerated above, and I do not agree with the defendant's submission that the evidence is inadmissible. I therefore accepted Phua's evidence in relation to the issuance of invoices under the RDSLAM project. In similar vein it follows that the invoices issued in respect of the

UMMC project are similarly admissible in evidence for the same reason.

THE UMMC PROJECT

[53] The salient terms of the UMMC contract are as follows:

(a) the contract sum for the supply of hardware, software and applications for THIS was RM44,907,951.44 as specified in Appendix A;

(b) the rates for the plaintiff's provision of works is set out in Appendix B;

(c) all costs of training such as venue, materials etc were to be borne by the defendant; and

(d) payment terms were on a back to back basis in accordance with UMMC's Schedule of payment.

[54] Accordingly Appendix A sets out the contract sum as of April 2006 while Appendix B sets out the rates for professional services.

[55] The primary contract between UMMC and the defendant provided initially for a contract price of RM48,680,846. Vide letter dated 20 June 2006, UMMC wrote to the defendant revising the contract price to RM49,948,344.

[56] At the onset of this project, the plaintiff utilised a vendor or supplier by the name of IBA Health Ltd ('IBA'). However UMMC rejected the application software submitted by IBA on 22 December 2006 and directed the defendant to appoint another supplier, iSOFT Holdings directly. However no penalty was imposed by UMMC by this rejection. The contractual sum under the original award between UMMC and the defendant remained the same.

[57] The only change was that, where previously the plaintiff had been responsible for IBA's obligations, the defendant now assumed those obligations vis a vis iSOFT Holdings.

[58] In the course of his evidence, Phua referred to the invoices and their supporting documents for the hardware that had been issued to the defendant for this project. He also referred to the invoices and supporting documents for the claims for reimbursements which had been issued to the defendant.

[59] The defendant did however raise numerous objections to the UMMC invoices as tabulated in exh CBD21. Objections were taken to 41 different invoices and their supporting documents. The plaintiff responded to each of these issues and the same is evident upon a reading of CBD21 in its entirety. By

way of example, I make reference at random to some of the points raised by the defendant in CBD21:

(a) with respect to Invoice No 00709 dated 12 February 2009 issued by the defendant carrying invoicing request number IR-0902-003-LMF, the defendant complains that the supporting invoice from the supplier, Corelogic to the plaintiff is dated 1 April 2008, approximately a year prior to the issuance of the plaintiff's invoice to the defendant. The plaintiff meets this complaint by explaining that:

(i) although Corelogic invoiced the plaintiff on 1 April 2008, the plaintiff did not approve the same for payment until Corelogic's delivery was accepted on 12 January 2009;

(ii) the plaintiff's project team checked and approved Corelogic's invoice onsite at UMMC on 16 January 2009, and then forwarded the said invoice to FSBM office on 1 February 2009 for onward payment and billing processing; and

(iii) the plaintiff then invoiced TSB on 12 February 2009. This therefore explained the reason why the plaintiff's invoice was dated considerably after that of the original supplier, Corelogic.

(b) with respect to Invoice No 00576 dated 31 December 2007 bearing invoicing request number IR-0712-011-LMF the defendant's complaint was that the invoice date is earlier than the management approval date which is 2 January 2008. Moreover, this invoice was for the implementation service charges and it is difficult to verify the basis for such charges. The plaintiff responded to this as follows:

(i) the plaintiff's invoicing request, which is an internal document was issued on 24 December 2007 and approved by management on 2 January 2008. An Invoicing request is used internally to trigger FSBM finance to generate the invoice;

(ii) the invoice to the defendant was dated 31 December 2007 by the Finance Department to enable the plaintiff to close its account for 2007; and

(iii) this invoice did not relate solely to mere equipment delivery, but included installation, testing, commissioning for which services were required. Therefore the invoice contains service charges.

[60] Again it is evident that the plaintiff answered the queries the defendant put forward through its counsel in relation to the UMMC project. I have perused CBD21 in its entirety and am satisfied that there is a reasonable explanation for each of the issues raised by the defendant. It is significant that

in none of the cases is there any imputation, suggestion or evidence to the effect that the plaintiff's invoices were simply fabricated. Neither was that put to PW1.

[61] As such what transpires from the grievances raised by the defendant in relation to the UMMC invoices is that there were several details in the supporting documents that they could not correlate to the invoices. These issues were fully explained by the plaintiff. By so doing the plaintiff through Phua further fortified my finding above that the plaintiff's documentation in relation to equipment supplied and work done was genuine and complete. The documentation comprised not merely invoices, but also the supporting documents that established the existence of a clear system of work and billing, which ensured that the work done on these projects was fully and satisfactorily completed. The defendant did not participate in the carrying out of the project as that was done almost entirely by the plaintiff. However the defendant was the entity that received payment for work done as the main contracts for the projects were between the defendant and the third party clients.

[62] The fact that the defendant was paid for work done in itself establishes that the requisite goods and services were indeed supplied and provided satisfactorily. In these circumstances I am satisfied that the queries raised by the defendant do not constitute a defence to the plaintiff's claim for monies for services rendered and equipment supplied. The defendant has failed or neglected to specify what portion of the plaintiff's claim should be denied, and instead submits that the whole claim ought to be disallowed. In the face of the documentation produced and the fact that the plaintiff has responded to all issues raised by the defendant, it appears that the defendant's denial of monies due and owing under the UMMC contract is less than credible.

[63] It was also submitted on behalf of the defendant in respect of both projects, that the financial controller, one Mr Au Eng Hock should have testified as to the plaintiff's accounts. While Phua was the management representative who approved all the invoicing requests prior to the raising of the invoices, the financial controller was in charge of the department that raised the invoice. In other words, the defendant's objection to Phua was that he did not raise the invoices to be issued to the defendant but approved the invoicing request. The defendant sought to raise an adverse inference against the plaintiff for failing to call Mr Au Eng Hock as a witness.

[64] As I have explained earlier, Mr Au Eng Hock would have no better knowledge of the invoices than Mr Phua as Mr Au could only act upon receipt of approval from Phua for the raising of an invoice in the first place. Both of them would not have personal knowledge of the actual equipment supplied or work done but would rely on supporting documentation to ascertain that

equipment had indeed been delivered and that installation had been successful. I have dealt with this point in some detail earlier. In these circumstances I fail to comprehend how the failure to call Mr Au who would be in no better position than Phua, warrants or justifies the drawing of an adverse inference.

[65] Such a finding is corroborated further by the evidence of PW2, Mr Gunasegaran who is the senior assistant director of the Finance Department of UMMC. He produced a ledger of payments made to the defendant by UMMC up to 4 February 2010. A summary of receipts of payment from UMMC by the defendant was made by the plaintiff. Based on this, it transpires that a sum of RM28,584,341.60 was paid by UMMC to the defendant for the UMMC project. To date however, the defendant has only remitted a sum of RM8,926,298.27 to the plaintiff. This is so notwithstanding that the contract between the Plaintiff and the defendant provided for 'back to back' remittance of monies received from UMMC. This is so despite the fact that it was the plaintiff that undertook the procurement of the equipment and has had to bear the costs of paying the suppliers as well as the personnel who provided the implementation and installation, testing and commissioning services.

[66] Haliza was asked why in the year 2008, the defendant only paid out RM464,000 to the plaintiff when it actually received RM6.3m from UMMC. Regrettably no real sense can be made of her answer save to conclude that she had no answer to this simple question. When asked if the monies were used for something else by the defendant her answer was no. She insisted that the monies were paid to FSBM. She was however unable to produce any evidence of this, despite being a director having control of the defendant. She said instead that she did not control the accounts so she did not know but that all monies went to FSBM or the plaintiff. This again was not tenable in the face of a complete lack of evidence and given the fact that she is a cheque signatory. Haliza also agreed that the contract with UMMC was on a back to back basis in that upon receipt of payment from UMMC, the defendant was supposed to pay the plaintiff. Haliza sought to suggest that as the UMMC contract was varied to remove IBA, the defendant made payment to iSOFT. When it was put to her that in 2008, no payments had been made to iSOFT, she again maintained that she did not have records. As such her evidence on this point was not credible. It therefore was clear from the evidence of PW1, Mr Gunasegaran in conjunction with that of Haliza, that a significant amount of monies paid to the defendant by UMMC, and which should have been remitted to the plaintiff under the terms of the contract, were not so remitted. It is equally unclear what happened to those monies.

[67] The defendant sought to have the evidence of Mr Gunasegaran excluded from the evidence on the grounds that the payment ledger produced by Mr Gunasegaran from UMMC did not comply with s 90A of the Evidence

Act in that the plaintiff had not produced a certificate verifying the efficacy of the workings of the computer system of UMMC. Mr Gunasegaran was a subpoenaed witness. He is as stated above, a senior assistant director of UMMC. He is in charge of the payments made by UMMC to third party contractors such as the defendant. In these circumstances, as he was personally present to give evidence that such payments had been made to the defendant, the need for a certificate under s 90A is not warranted. Such a certificate would have been relevant and necessary if the plaintiff had sought to introduce in evidence a ledger of payments from UMMC records without a witness to explain the document or its origins. Here the plaintiff procured the presence of a witness who has charge of these payments. Accordingly the objection is entirely unfounded.

[68] This evidence of receipt of payments by the defendant from UMMC which was not remitted on a back to back basis to the plaintiff as provided for under the contract is relevant because it establishes that:

(a) the work under the UMMC project had been satisfactorily conducted or carried out by the plaintiff to the extent of the payment made;

(b) despite this and the contractual provisions, the defendant had failed, refused or neglected to remit these payments to the plaintiff; and

(c) the defendant had failed in the course of trial to explain how or where these monies were kept or utilised, simply stating instead, with no evidential backing that payments had been made to FSBM or the plaintiff. No bank accounts or ledgers or documentary evidence in any form was produced to corroborate these bare statements. As such they appeared to be inherently improbable.

[69] The defendant also sought to suggest that at all times the accounts of the defendant were under the control of the plaintiff and FSBM. However the failure to remit monies received from UMMC to the plaintiff only arose after Dato' Tan resigned as a cheque signatory of the defendant in November 2007. After Dato' Tan left the defendant Prof Azman, Haliza and one Azah bt Abdul Kadir were the signatories for the defendant's various bank accounts.

[70] After Dato' Tan left the defendant he explained that he had no control over the monies received by the defendant. Neither did he know when monies were remitted by UMMC to the defendant as payment for work done. He relied on Haliza, who was after all a senior employee of FSBM to keep him informed. He also relied on Prof Azman who was an executive director of FSBM to keep him informed. Neither of them did so. They also failed to remit the monies paid by UMMC and to date have failed to provide disclosure as to the whereabouts of those monies or whether they have been utilised. In short, notwithstanding that they were respectively an executive director and senior

employee of FSBM, the holding company of the plaintiff, they failed to provide disclosure and wrongfully retained monies due to the plaintiff from the defendant.

ADMISSIONS BY THE DEFENDANT

[71] Apart from the factual matrix outlined above, the defendant has at various stages in the course of this dispute, prior to commencement of trial admitted that there is a debt due and owing by it to the plaintiff.

Audit confirmation dated 3 February 2009 signed by Prof Azman and Haliza

[72] Vide an audit confirmation dated 3 February 2009 signed by Professor Azman and Haliza on behalf of the defendant they confirmed that as at 31 December 2008 there was a sum of RM27,523,094.32 due and owing by the defendant to the plaintiff. This audit confirmation was supported by a document produced by the plaintiff entitled 'summary aging of amount due from Technitium Sdn Bhd' as well as a statement from the plaintiff all supporting the quantum specified in the audit confirmation as being the sum due from the defendant to the plaintiff.

[73] Prof Azman stated in his evidence that he signed the audit confirmation with the qualification that the said claim was disputed but was persuaded to remove it by Dato' Tan and one Mr Ow Eng Haw, the chief financial officer of FSBM. When asked however during the course of cross-examination where the letter with the qualification was, he claimed that the letter had been returned to Ow who had destroyed it. It was not possible to ascertain or verify Prof Azman's version of events.

[74] Prof Azman however did agree that notwithstanding that the audit confirmation was signed in February 2009, he only issued a written notice to dispute the debt some eight months later on 8 October 2009. Taken as a whole, the audit confirmation cannot be taken as being qualified on the face of it. It appears to be a clear and unequivocal admission on the part of the defendant. However eight months later by disputing the debt, the defendant sought to retract the admission.

An internal memorandum drafted by Haliza dated 18 August 2009

[75] This memorandum was an internal memorandum of the defendant, addressed to Prof Azman and prepared by Haliza. It is dated 18 August 2009. Prof Azman gave a copy of this internal memorandum to Dato' Tan for the purposes of resolving the issue of the large debt owing by the defendant to the plaintiff. Prof Azman's handwritten note states:

… Dear Dato' Tan,

I have requested Liza to prepare TSB's financial status vis a vis FSBM. Please verify. Thank you.

[76] Prof Azman has signed and dated it 20 August 2009. This internal memorandum sets out a detailed tabulation of the total amount due and owing by the defendant to the plaintiff for the UMMC, RDSLAM and other projects, together with late payment charges. It specifies that out of the total amount of RM27,498,992.32 due and owing to the plaintiff, a sum of RM4,452,262.89 has been paid leaving a balance sum of RM23,046,729.43 unpaid.

[77] The statement expressly stipulates, inter alia, that:

Out of the RM27m odd outstanding a sum of RM16,243,792.38 was the known and anticipated cost. Then taking this lesser sum as the outstanding sum, less the sum of RM4m odd repaid, the defendant proposed that the final balance sum be fixed at RM11,791,529.49 as of end 2008.

[78] The memorandum then goes on to substantiate why the outstanding sum of RM27m odd ought to be reduced to RM16m.

[79] Dato' Tan produced this memorandum in the course of his evidence. However he also pointed out the fact that the defendant had produced another copy of this memorandum in its documents, but where parts of the contents were distinctly changed. He maintained that his was the original copy because Prof Azman's handwriting appeared on it.

[80] An inspection of the original document produced by Dato' Tan and the copy with substantive portions altered, which appeared in the defendant's bundle of documents were compared. It was immediately apparent that portions of this memorandum had been altered prior to production in court. No attempt had been made by the defendants to explain this discrepancy until Dato' Tan pointed out the differences. I shall deal with the issue of the dual versions of this document at a later stage in this judgment.

[81] For the present purposes the internal memorandum handed to Dato' Tan evidences a clear admission of the defendant's debts. In the light of this admission, the attempts to render the plaintiff's evidence inadmissible, and the general bare denial of work done and equipment provided, appears to be less than credible. In other words, despite having expressly accepted, admitted and conceded in correspondence to the plaintiff that there was a large debt due and owing to the plaintiff, the defendant chose to deny the provision of equipment and services in court proceedings. Learned counsel for the defendant chose to explain this by maintaining that these admissions were all qualified. However

none of the correspondence discloses this. In fact given the voluminous documentation produced by the plaintiff with its supporting evidence and the fact that the defendant admits in evidence that it has received payment for work done by the plaintiff on these projects, the stance taken by the defendant to the effect that no monies are owed appears to this court to be mala fide.

Audited financial statement of the defendant for the financial year ended 31 December 2009

[82] In its audited financial statements the defendant has admitted the following sums are due and owing to the plaintiff:

	2009	2008
The plaintiff	17,730,268	20,527,636

[83] These audited financial statements for the year ended 31 December 2009 and 2008 were signed on 11 June 2010 and 12 June 2009 by Prof Azman and Haliza as the directors of the defendant. They confirmed the same by way of a statutory declaration.

Meeting notes written by Prof Azman to Tan Sri Zainol the chairman of the Audit Committee and non-executive director of FSBM

[84] These notes were prepared by Prof Azman on 30 November 2009 in respect of the dispute between the defendant and the plaintiff. In the course of setting out the basis for his dispute on the debt claimed by the plaintiff, he stated, inter alia:

At para (b) of the first page:

> … Similarly, TSB and FSBM jointly bid for RDSLAM project at RM10.1 million. Third party products cost some RM9 million …

And at para (f) of the second page:

> … According to my information, FSBM is expecting some RM28.5 million payment from TSB (the Defendant) for both UMMC and RDSLAM projects, of which RM14.5m are for genuine products whereas a whopping RM13.5m left to be collected from UMMC but we believe we can only collect RM11m because of LAD. The RM11m payment isn't even sufficient to pay for third party products some of which are directly under TSB and the rest under FSBM. There is no more collection from RDSLAM project …

Proposal for settlement dated 11 December 2009

[85] In the course of cross-examination, Prof Azman admitted that he had prepared this proposal for settlement and that the figures set out there were correct. He also agreed that by this proposal the defendant had agreed to pay the sums proposed.

[86] This shows that the defendant accepted the figures produced by the plaintiff but sought a discount on the quantum to be repaid.

[87] A consideration of the entirety of the documents bears out the conclusion that the defendant indeed by its conduct accepted and conceded well before the inception of this suit that there is a debt due and owing by it to the plaintiff for equipment supplied and services rendered in respect of the RDSLAM project, the UMMC project and other projects. Learned counsel for the defendant however maintains that the admissions above are not conclusive proof of the matters admitted but works at best by way of estoppel, so as to preclude the defendant from denying the existence of such a debt. It is submitted that the audit confirmation cannot be held against the defendant as the plaintiff had full control of the accounts relating to the projects. This however detracts from the fact that receipts were fully within the control of the defendant and that invoices were despatched to the defendant such that it had records of the same.

[88] What then are the substantive issues that the defendant raises to dispute and deny the plaintiff's claim? Based on a perusal of the documents above it would appear that the defendant disputes the charges for professional services, reimbursements, late payment interest and the claims for 'other projects'.

[89] With respect to the claim for professional services both the RDSLAM and UMMC contract provide for the levy of charges at the rates set out in Appendix B for the provision of services by the plaintiff. There is therefore no tenable basis for the defendant to deny the plaintiff's entitlement to make claim for the same. On the basis of the contract executed between the parties, the plaintiff is entitled to make such claim. Prof Azman also admitted in the course of cross-examination that the defendant had, in the past, made such payments. Accordingly the defendant is contractually bound to make these payments.

[90] When Appendix B was shown to Haliza she claimed in the course of cross-examination that she did not know the implications of the terms of the UMMC and RDSLAM letters of award. She insisted that she had 'no clue' about the quantum of professional services. This again was untenable given that she was a director of the defendant, a senior employee of FSBM and a graduate with a degree in computer science from Ohio University, USA.

[91] With regards to the claim for reimbursements again both the RDSLAM and UMMC contracts provide for the defendant to meet all out of pocket expenses. When this was shown to Prof Azman he stated that he was not aware of this and that now that he had been made aware, he would evaluate the situation again. This appeared to be a concession to the fact that out of pocket expenses were due to the plaintiff.

[92] Prof Azman was also asked where he got the impression that service charges as set out in Appendix B were merely for internal use. He could not answer this question.

[93] As for late interest charges, the invoices of the plaintiff stipulate that they are entitled to charge 1.5% per month on all overdue amounts, which totals 18% pa. In the present action the plaintif however claims 1.5% per annum above the Maybank BLR which is lower than the contractual rate. It appears to the court that this imposition of interest is unilateral. I am therefore not inclined to grant interest at either of those rates.

[94] Finally with regard to the other projects for goods and reimbursements I agree with learned counsel for the plaintiff that the defendant had, through DW1 in the proposal for settlement dated 11 December 2009 acknowledged that these claims were payable, save that some apportionment ought to be done for the Saudi project and the remedy health expenditure.

THE PLAINTIFF'S WITNESSES

[95] I found both Phua and Dato' Tan to be credible forthright witnesses. They gave evidence on all aspects of the relationship between the parties, the projects undertaken as well as the deterioration in the relationship between the plaintiff and the defendant. Phua's role was primarily focused on the documentation supporting the plaintiff's claim, which as I have found earlier, was credible and valid. The production of supporting documentation and a detailed explanation of how the defendant was billed for equipment supplied and work done was consistent. He was able to explain each of the issues raised by the defendant in relation to the UMMC project. I found Phua to be a truthful witness and accept his evidence in full.

[96] Dato' Tan explained the background of the relationship between the parties and also the evidence pertaining to the admissions as contained in the audit confirmation, internal memorandum and proposal for settlement. His evidence was direct, and where it related to admissions, premised on documents produced by the defendant. There was no reason to doubt his credibility and he struck me as a truthful and credible witness.

[97] Mr Gunasegaran was a subpoenaed witness who produced the records of UMMC. There was no reason to doubt his evidence. In summary the evidence adduced by the plaintiff was comprehensive, credible and compelling.

THE DEFENCE CASE AND COUNTERCLAIM

The evidence of Prof Azman

[98] Turning to the defence case, Prof Azman set out his version of events. He explained how he came to join the defendant and his relationship with Dato' Tan. He explained that he took over Dr Abu's shares and although he did not pay for them he provided his expertise and procured several large projects for the benefit of FSBM and the defendant. At that time, in 2004, Dato' Tan and Haliza were directors of the defendant. He outlined the manner in which business was conducted between the defendant, third parties and the plaintiff. This was almost entirely consonant with the evidence of the plaintiff. He confirmed that the defendant would 'lobby' as he put it for clients and secure the projects while the plaintiff would perform the work under the subcontracts executed with the defendant.

[99] Prof Azman maintained that this same modus was utilised in respect of the RDSLAM and UMMC projects. However he maintained that the letter of award dated 17 January 2006 was not signed with the authority of the defendant.

[100] He testified that the dispute between the plaintiff and the defendant commenced in 2009. He explained that he signed the audit confirmation letter with a qualification that the claims were disputed, but that Dato' Tan and Mr Ow insisted on the removal of the same. They assured him, he said that the debt would be 'rationalised' in the next set of accounts, once finalised. On this basis he confirmed that he signed the letter without qualification.

[101] He then talked about the various correspondence he had engaged in with Dato' Tan including the internal memorandum prepared by Haliza dated 19 August 2009. He explained that matters came to a head when on 7 December 2009 he received a reply from Dato' Tan of FSBM stating that rationalisation could not involve a question of a waiver and write-off of a disputed debt and could not involve FSBM which was a public listed company. Prof Azman explained that he felt deceived and misled by the failure of Dato' Tan to assist in 'rationalising' the debt due from the defendant to the plaintiff. He therefore sought an internal audit and a forensic audit of the accounts of the projects.

[102] In support of the counterclaim, Prof Azman maintained that there was an excess payment by the defendant of RM2,898,040.23 to the plaintiff. This comprised part of the counterclaim.

[103] With regards to the UMMC project, Prof Azman stated that taking into account late delivery, maintenance charges incurred by TSB, payments to vendors not paid by the plaintiff and the reduction in the contract sum under the THIS project relating to the cancellation of the IBA portion, the defendant has a substantial claim against the plaintiff. As a consequence of these matters he maintained that there was a balance of approximately RM10m owing which the defendant seeks to set off from its counterclaim against the plaintiff.

[104] As for the reimbursement claim, Prof Azman maintained that these are not reimbursable under the agreements between the parties, as they were incurred by the plaintiff, FSBM and its employees:

(a) on the issue of professional fees amounting to RM13,872,338.13 payable to RDSLAm and UMMC, Prof Azman maintained that the plaintiff was bound by the terms of the main contract between the client and the defendant;

(b) the definition of works was inclusive of professional charges and therefore these 'extra' charges were not payable;

(c) the provision for service charges in the letters of award did not mean that they could be levied. The provision was merely for internal use;

(d) professional fees were not payable under the letters of award and certainly not over and above the subcontract sum; and

(e) there was no agreement for interest charges.

[105] In support of the counterclaim, Prof Azman repeated the foregoing, and set out a detailed basis for the counterclaim which I do not propose to repeat in full. However it must be said that in the course of cross-examination, it transpired from the witness himself that he did not comprehend or know anything about the accounts and accordingly a considerable portion of his evidence relating to the counterclaim was in fact adopted by the defendant's third witness, Haliza bt Bidin.

[106] In the course of cross-examination, Prof Azman confirmed that he took over Dr Abu's 78.8% shareholding. He did not make any actual payment for the acquisition of this shareholding but explained that he paid in 'net worth', by which he meant that he had assisted in bringing in projects two other companies, namely one Bestarian and FSBM, which were in themselves of substantial value.

[107] It was put to him that despite his position in FSBM as chairman of the RISK Committee he had failed to advise FSBM of the business dealings between the plaintiff and the defendant. Prof Azman explained that his function was primarily to secure projects and clients and nothing else. Prof Azman confirmed that the contract between the plaintiff and the defendant provided for a 'back to back' remittance of payments. He accepted that once the defendant was paid by UMMC, it would pay the plaintiff for its invoices. However he maintained that he was not responsible for ensuring such payments were in fact made.

[108] He was shown the UMMC documents and the plaintiff's tabulation which disclosed that in 2008 the defendant had received RM6.3m from UMMC. It was also put to him that the defendant however, only paid a sum of RM464,564.82 to the plaintiff. Again Prof Azman replied that he was not in charge of this. He suggested that FSBM would be appraised of this but when it was put to him that as of 2007 FSBM through Jaring Sekitar had divested itself of all interest in the defendant conceded that Haliza would be conversant with this. He also agreed that as Dato' Tan ceased to be signatory of the defendant from November 2007, he would not have knowledge of the payments made by UMMC to the defendant. He stated that he was not in charge of 'numbers'. When it was put to him that as chairman of the RISK Committee he had failed to advise FSBM and the plaintiff that UMMC had made progress payments to the defendant in 2008 he disagreed. He did however agree that at that time, in 2008 there was no dispute between the plaintiff and the defendant. Prof Azman had stated in examination in chief that Dato' Tan remained a cheque signatory of the defendant until 2010. When it was shown to him that Dato' Tan had ceased to be a signatory in 2007, he agreed that his evidence was incorrect in so far as the date was concerned.

[109] Next he was questioned about the business relationship between the plaintiff and the defendant. He agreed that the relationship between them, ie the plaintiff and the defendant was reduced to writing in the form of the letters of award. However he could not confirm that the letters of award by the defendant to the plaintiff were negotiated on an arms' length basis. He did however, accept that the contracts comprised related party transactions which would require shareholders' mandate. He was referred to a document which set out the defendant under 'classes of related parties'. In other words, there was acceptance that the contracts between the plaintiff and the defendant required shareholders' mandate as they were related parties and this had been procured.

[110] Next the issue of the second letter of award, varying the first letter of award in relation to the definition of 'works' for the RDSLAM project, was touched upon. On this issue, Prof Azman had stated in examination-in-chief that the defendant had not authorised the acceptance of this variation.

However in the course of cross-examination he accepted that Rozali Salleh signed on behalf of the defendant as sales director, but that he had not been aware of it. He also accepted that on secondment, Rozali Salleh was located at the defendant's offices. He disagreed however that Salleh took instructions from Haliza.

[111] When questioned in greater detail about the UMMC and RDSLAM contracts, Prof Azman answered that he did not know. In fact he was unable to answer most of the questions put to him in relation to these projects. He was unable to comment on the number of ports supplied under the RDSLAM project, stating simply that he had no knowledge. When asked to confirm that the defendant did not in fact have any dispute with the plaintiff on the costs of hardware in so far as RDSLAM was concerned, he again maintained that he did not know.

[112] He was taken through the various admissions made and he maintained that these admissions were premised on the figures supplied by FSBM. He was then referred to a proposal for settlement prepared by Prof Azman himself. He conceded that in the proposal he agreed to pay a sum of RM10,615,153.83 in respect of the RDSLAM project to the plaintiff.

[113] Prof Azman was then referred to a letter of award dated 3 August 2005 from the defendant to the plaintiff in respect of the RDSLAM project. He was referred to the Appendices A and B. When it was put to him on the basis of these appendices which comprise a part of the letter of award that the defendant had in fact agreed to pay one set of costs for hardware and another set of charges for professional charges, the witness maintained that he was not aware of this.

[114] He was then taken through the procedure adopted by the plaintiff in procuring hardware from third party suppliers and providing the same to the defendant at their own costs, and on the basis of which they billed the defendants with a surcharge of 3% as agreed in the letter of award. He accepted that the third party supplier was *datang* from China, but professed ignorance on all other matters related to the billing of the defendant for such products.

[115] Prof Azman was then referred to the contract between the defendant and Telekom with respect to the RDSLAM project. He accepted that he was a signatory on behalf of the defendant. It was put to him that the contract does not contain provisions in relation to maintenance, to which he replied that he did not know. He also stated that he did not know whether the RDSLAM project had been completed or whether Telekom had in fact paid the defendant in full.

[116] Moving on to the internal memorandum prepared by Haliza for Prof Azman dated 18 August 2009, Prof Azman conceded that he had agreed to make the payments stipulated therein. He stipulated that this was based on the data given to the defendant. When it was put to him that Haliza had prepared the document on the basis of the documents of the defendant itself, he stated that he was unaware of the same.

[117] On the purpose of the memorandum, he stated that it was issued because there was a dispute between the plaintiff and the defendant. He wanted to resolve the same and was unaware of the figures and so asked Haliza to prepare the status. However he reiterated that at that time 'they', meaning the defendant, was unaware of these figures. It was put to him that when the memorandum was prepared, the defendant had in its possession all the requisite documents and figures to which Prof Azman maintained he did not know.

[118] Moving on to charges for professional fees, the witness agreed that in the past, the defendant had paid for professional charges levied by the plaintiff. In his evidence-in-chief the witness had said that professional charges were paid pursuant to directives and instructions of Dato' Tan who was controlling the financial management and accounts of the project. Prof Azman however stated that he had no personal knowledge that this was so.

[119] He had also testified in examination in chief in relation to the UMMC project that there was non-performance, late delivery and maintenance charges incurred by the defendant. When he was asked to give one instance of non-performance by the plaintiff, he said that he could not give any example because he was not involved in the implementation of the project. When it was put to him that he had no personal knowledge relating to the matters averred to in his evidence in chief in relation to these matters he admitted that he had said so on the basis of an opinion by a forensic accountant named Mr Prabath Kumar. However he conceded that Mr Kumar was never involved in the implementation of the UMMC project at any stage. The forensic accountant had only come into the picture after the commencement of this action.

[120] At this juncture as it was becoming very apparent that Prof Azman had no knowledge about most matters pertaining to the project, the contracts etc, the court intervened to ask whether these questions were more appropriately put to another witness in fairness to Prof Azman. The witness conceded that he did not know very much about the figures.

[121] When questioned about the replacement of IBA with iSOFT, Prof Azman also maintained that he had no knowledge about the same. However he

agreed that when the latter replaced the former, the tender price between UMMC and the defendant remained the same. He also accepted that the defendant appointed iSOFT directly.

[122] Next, Prof Azman was questioned on reimbursements and out of pocket expenses. The defendant's stance was that it was not liable to pay the same. Prof Azman was referred to Appendix B of the contracts between the plaintiff and the defendant and it was put to him that the defendant had in fact expressly agreed to bear these charges. Prof Azman stated that he was not aware of this but that if he had been aware, he would re-evaluate the situation. Similarly on the issue of interest, Prof Azman maintained that he was not aware.

[123] When Prof Azman was referred to various admissions in documents such as the financial statement dated 31 December 2009 and the audit confirmation he accepted that these admissions had been made at that stage. He maintained that he had qualified the audit confirmation but suspected that when that letter was given to the Ow, it had been destroyed. He maintained that although he signed the audit confirmation maintaining that the sum of RM27,523,094.22 was due and owing to the plaintiff he was not happy because he did not have the details. He then left for Australia having signed the audit confirmation in February 2009. It was put to him that if indeed he had been unhappy he would have sent a memo making this clear immediately upon his return. Prof Azman maintained that he had done so. However he was unable to explain the reason why he had only disputed this figure was sometime in October 2009, some eight months after having signed the audit confirmation.

[124] The contents of the memorandum of 18 August 2009 prepared by Haliza were then shown to him and compared with the second version of the same document submitted to the court as a defence document. He conceded and accepted that several salient paragraphs had been omitted or varied. However he maintained that only Haliza would be able to explain this.

[125] Prof Azman was asked about his proposal to Dato' Tan to 'rationalise' the debt due to the plaintiff. It was put to him that he was actually seeking a discount rather than denying liability in toto. Prof Azman agreed partially but maintained at that time the defendant had sought a discount. But subsequently it had changed its position when they 'discovered' certain facts.

[126] When asked whether in December 2009 both projects were at the tail end, he concurred. When it was put to him that the plaintiff had executed its responsibilities under the letters of award, he said they had not done so satisfactorily. He could not however provide any details on how this was the

case. He continually maintained that the accounts furnished by the plaintiff were 'dubious' or 'suspicious' and 'irregular' but was unable to detail in a single instance how this was so. He said that that evidence was premised on the forensic accountant. He was unable to advise when the forensic accountant was appoint.

[127] Prof Azman was then questioned extensively on the 'rationalisation' of the debt. He explained that the defendant had tried various ways to resolve its debt with the plaintiff and a discount was one of the means. He knew that such a rationalisation or discount was not possible because the transaction was a related party transaction and had to be undertaken carefully because he was also involved as an executive director of FSBM.

[128] On the counterclaim and the issue of compensation paid to Telekom he was unable to tell the court whether any monies had been actually paid by the defendant but stated that they were negotiating with Telekom on a penalty. Invariably his answer to queries on most documents in this respect was that Haliza would be aware of these matters or that he would have to check the same with Haliza. It was apparent that Prof Azman depended almost entirely on Haliza to manage the affairs of the defendant particularly in relation to the two projects comprising the subject matter of this action. Ultimately he said that these questions were best posed to Haliza.

[129] As a consequence by consent the court recorded that Prof Azman was not conversant with the computation of the figures in the matter. These matters were within the knowledge of Haliza.

[130] In the course of re-examination, Prof Azman sought to explain many of the matters referred to in cross-examination which I do not propose to set out in detail here. Suffice to say that given his general lack of any real knowledge of the figures pertaining to the claim matters did not improve considerably in the course of re-examination.

[131] Overall Prof Azman came across as a witness who was not appraised of the matters in dispute in this claim. He clearly took a completely 'off-hand' approach to the business of the defendant, seeing his role as being solely that of marketing to bring in new business. It was evident that he had no knowledge of the letters of award or the basis for the billings by the plaintiff of the defendant or of work done under the two letters of award. What came across was that he left everything almost entirely in the hands of Haliza. He had only become more involved when an attempt was made to resolve the dispute between the parties through negotiations between Dato' Tan and himself. He had no knowledge of the contents of the counterclaim.

[132] On the issue of the numerous admissions made in the form of the audit confirmation and financial statements prior to this suit, his stance that the admissions were valid at the time but no longer so, seemed weak and less than tenable. This stance appeared to be a convenient manner in which to deal with clear admissions as to the liability of the defendant with which he was not in any event conversant. However it did not explain away the clear admissions made in the course of the dispute, and he is estopped from now seeking to resile from the same. The witness appeared to be avoiding any admission of the debt by claiming complete ignorance and maintaining that Haliza and the forensic accountant would be in a position to explain matters. Given that Prof Azman is and was at all times a director of the defendant as well as executive director and the RISK chairman of FSBM until 2010, such a stance appears unsustainable. It is improbable that a person occupying those senior positions could have so little knowledge and be so completely ignorant of the activities of the defendant and the plaintiff in relation to the RDSLAM and UMMC projects. Ultimately this witness was unable to substantiate the defendants' case in any sustainable manner.

EVIDENCE OF HALIZA BT BIDIN, DW2 ('HALIZA')

[133] In her examination in chief Haliza set out the history of her employment with FSBM and her role in the defendant, which has been set out in full at the outset of this judgment in the salient facts. She confirmed that she became an executive director of the defendant from mid-May 2001. She explained that the defendant was incorporated in May 2001 by FSBM because they wanted a bumiputra arm to secure government and non-governmental related projects. She then explained the history of the ownership of shareholding in the defendant. She also explained that at all material times she was an employee of FSBM.

[134] Haliza went on to explain the arrangements between the defendant and FSBM whereby the defendant would secure the project and be the client manager while FSBM or its subsidiary would execute the project, with full management and financial control. She maintained that FSBM had full financial control of the accounts of the defendant. She stated that she reported to Mr Phua Cheng Khan.

[135] With regards to her signature on the audited accounts acknowledging a substantial debt from the defendant to the plaintiff, she maintained that she signed the same on being told to do so by Prof Azman who assured her that Dato' Tan would 'rationalise' the accounts. As for the two versions of the internal memorandum dated 18 August 2009 prepared by her, she explained the same by testifying that she wrote the first version and handed the same to Prof Azman. This was the version that was handed over to Dato' Tan.

According to her, on the same, day she then wrote the second version. She stated that she was trying to go through the accounts to determine the figures and had revised the same. She maintained that the two versions were two different documents. She did not explain why both versions were not exhibited by the defendants in their bundle of documents and the differences pointed out and explained at the outset.

[136] In the course of cross-examination, Haliza accepted that upon the transfer of Jaring Sekitar Sdn Bhd's 20% shareholding to her in June 2007, Dato' Tan resigned as director and ceased to be a cheque signatory as of November 2007. Haliza maintained that she thought he was still a signatory. It was then put to her that after Dato' Tan resigned effectively she and Prof Azman controlled the bank accounts of the defendant. Haliza denied this maintaining that an employee of FSBM, one Azah Kadir was also a signatory. It was then put to her that most payments were signed by her and Prof Azman with which suggestion she disagreed. She maintained that she and Azah signed most of the cheques. It was then put to her that if indeed Azah had been signing most of the cheques, then the plaintiff would not be suing the defendant because the FSBM nominee would have ensured that the plaintiff was fully paid. She replied that she did not know.

[137] Haliza accepted that the 'business relationship' between the plaintiff and the defendant was regulated by letters of award which comprised the contract between the two entities. When it was put to her that the pricing was negotiated at arm's length, she disagreed maintaining that the pricing was guided by the plaintiff. She conceded that there were no favourable terms given by the plaintiff to the defendant.

[138] She was asked what was meant by the statement that FSBM was fully in control. Haliza explained that the defendant would get the contracts and pass them on to FSBM and they would source for all the products and services. So the defendant's only job was to bring in the projects, after which the plaintiff took control and managed the project completely including the financial aspects.

[139] It was then put to her that it was in fact the defendant that invoiced or billed the end client. To this Haliza maintained that there was a project management office that managed the billings and decided when to invoice the third party client etc. She denied knowledge of the same because she was not running the project on a day to day basis. All these instructions, she maintained, were controlled by the plaintiff or FSBM. She was then asked about monies coming in. According to her, she would advise the accounts clerk who would advise FSBM. Therefore the project management office would have knowledge of monies received. She was then referred to the ledger produced by

the UMMC representative, Mr Gunasegaran, PW2. She was asked why, if the defendant had received RM6.3m in payment from UMMC in 2008, only RM464,000 had been paid out to the plaintiff, given the fact that the contract between the plaintiff and the defendant was a 'back-to back' contract. Haliza gave a lengthy answer that was no entirely comprehensible, save to maintain that monies were always paid to the plaintiff or FSBM. In short she was unable to explain this anomaly. She denied however that the monies received from UMMC were utilised for anything else by the defendant. She maintained that the monies were paid to the plaintiff or FSBM. However no documentary evidence was produced to substantiate this. When asked for proof she merely stated that she did not control the accounts, which were controlled by the plaintiff and FSBM.

[140] On the issue of reporting, she conceded that there was nothing in writing requiring her to report to PW1, Mr Phua Chen Khan. She confirmed that she did not inform Mr Phua when monies were received from UMMC. In like manner she also confirmed that there was nothing in writing to the effect that the defendant's accounts clerk, Marianna bt Ahmad Tahar reported to Ow. She was unable to confirm whether Marianna kept Ow informed of payment receipts from UMMC.

[141] She was shown the audited financial statement for 2009 and agreed that based on the same, the defendant had admitted that a sum of RM17,730,268 was due and owing to the plaintiff. Similarly with the audit confirmation she explained that she signed it because she had been told not to be concerned with the profit and loss account of the defendant. Her job was solely to procure projects.

[142] When asked about the delay in disputing the audited figures, she explained that it was due to the fact that Prof Azman was trying to resolve the matter amicably with Dato' Tan.

[143] She was referred to the internal memorandum dated 18 August 2009 and taken through the same with a view to establishing that there were clear admissions therein. She agreed but maintained that those admissions were premised on records and she had no idea whether those figures were correct or otherwise. Paragraph 1.4 of this memo reads as follows:

> … Out of the RM27,498,992.32 outstanding, items (A1), (B) and (C1) which amount to RM16,243,792.38 only were all known and anticipated cost.

[144] When it was put to her that there was no dispute that this sum was due and owing she maintained that this was so based on the records but that the

accuracy of the figures were not known. She also stated that this amount was verified by the invoices she signed, but that she did not have details when she signed the documents.

[145] She also conceded that one of the reasons why the defendant was rejecting the claim for professional services, late payment charges and the Saudi claim was so that it could show a better profit and loss account. Otherwise the defendant would not have a good financial record to procure projects from the government. She disagreed that she was trying to protect the defendant at the expense of the plaintiff.

[146] She agreed, based on the letters of award that there were charges to be incurred for the of provision or professional services, which was separate from the cost of hardware, software etc. However she maintained that the service rates in the appendix showed the rates between a customer and subsidiary, associates rates. It was then put to her that in 2006, the defendant was an associate company of the FSBM. And that therefore associate rates were applicable to it. She however maintained that this was inapplicable to RDSLAM and UMMC. She did not explain why. She went on to say that although the letters of award between the defendant and the plaintiff were signed by her she did not understand the implications of the same when she signed it. She had thought that the amount stipulated in the letter of award as a fixed sum would be the monies payable.

[147] Moving on to the internal memorandum she stated in the course of cross-examination unlike her evidence in the course of examination-in-chief that she had prepared the second version, appearing in the defendant's bundle of documents one or two days after she had prepared the first version which had been handed to Dato' Tan. That was the version produced by Dato' Tan in the course of his evidence voluntarily. If Dato' Tan had not produced the internal memorandum the fact that there were two different versions would never have been detected. The defendant, more particularly Haliza had not explained until Dato' Tan's evidence transpired that she had prepared two versions of the same document, both dated the same day, but had merely chosen to place one version before the court. Needless to state, the more favourable version with fewer concessions had been placed before the court as comprising a part of the defendant's bundle of documents.

[148] It appeared somewhat dubious to this court that two versions of the same document should subsist, particularly when one had been produced by an opposing witness in the course of trial. It seemed to this court that two possibilities arise when confronted with this sequence of events:

(a) two versions of the same document exist. Haliza's version that she

prepared the first version which was given to Dato' Tan and subsequently amended or varied it without changing the date, may well be true; and

(b) alternatively, the document produced in court in support of the defendant's case was altered for the purposes of trial and for that reason differs from the original version produced by Dato' Tan.

[149] It is not possible to stated with any degree of certainty which of the two scenarios is true. However it is pertinent that until Dato' Tan produced the original version from his file in the course of cross-examination, the defendants made no mention of the fact that a second version of that document had in fact been prepared and explained this in full. This explanation only came about subsequently when the original version was discovered. It follows from this that the document produced by the defendant was intended to convince this court that the contents therein were the one version which subsisted at all times. It is also pertinent that Haliza's evidence on this document is less than clear as in examination-in-chief she maintains that the document was altered on the same day, while in cross-examination she says it was varied or amended within a day or two. There was also no explanation as to why certain paragraphs containing clear admissions were altered. It was however put to her that the subsequent document in the defendant's bundle of documents never existed until the commencement of trial. She disagreed.

[150] Given the foregoing, it would appear that the defendants have not been wholly forthcoming in their evidence to this court. Weighing these matters in full, I am satisfied that Haliza's evidence was less than convincing or credible and was primarily tailored to devise a defence to the plaintiff's claim.

[151] On the issue of the variation to the RDSALM contract, which was issued by one Rozali Salleh, the then sales director of Technitium, Haliza maintained that she did not authorise him to sign the same. However she accepted that he had been seconded from FSBM to take charge of the Telekom accounts.

[152] Haliza adopted a significant portion of Prof Azman's answers as he was unable to answer many questions relating to quantum as well as the counterclaim. Haliza was not much better in dealing with these issues, as is evident from a perusal of her evidence. She was unable to answer any questions on the number of ports supplied under the RDSLAM contract. She maintained that she had signed all the requisite invoices as well as audited accounts and financial statements and that to that extent the figures were correct, but that she was unable to verify the same.

[153] This was the same position taken by Prof Azman. However when it is

considered that the third party client has in fact paid up in full, it follows that works were executed and completed by the plaintiff. Those monies however have not been forwarded to the plaintiff as provided for under the letters of award. Prof Azman and Haliza now say, after execution of those contracts that they need to verify those figures. However payment would not have transpired from the third party clients, ie Telekoms and UMMC unless works had been completed. It is in evidence that these clients have paid substantially or in full. In the case of RDSLAM, Haliza herself conceded that Telekoms had paid in full. UMMC through its senior employee also produced evidence of substantial payments to the defendant. However these monies have not been passed on to the plaintiff in accordance with the 'back to back' provisions envisaged in both letters of award. This the defendant has failed to explain.

[154] In this context, it is relevant that as stated earlier, Prof Azman maintained that he had no knowledge of the same and was unable to answer questions pertaining to the alleged losses suffered by the defendant.

[155] Haliza adopted the salient portions of Prof Azman's evidence pertaining to the counterclaim. However a perusal of her evidence discloses that there is simply insufficient independent documentary evidence to bear out this counterclaim.

[156] On the RDSLAM project and the alleged overpayment of RM2,898,040.34 I accept the plaintiff's evidence that the contract sum stipulated was for 34,944 ports only, while in the course of the project no less than 58,032 ports were supplied and delivered. No dispute was raised in relation to this matter until this action.

[157] On the issue of a purported levy of RM1,856,500 by Telekom, both Prof Azman and Haliza admitted in the course of their testimony that Telekom has merely threatened so. No claim has been made and more importantly no monies have been paid out by the defendant. There is therefore, no basis for such a claim, which remains premature.

[158] On the issue of maintenance at a cost of RM35,000 per month for the RDSLAM project no documents such as invoices, receipts or copies of cheques or bank statements have been produced by the defendant to show that it has actually incurred such charges. When questioned on this, Haliza merely stated that the defendant had the records but had not produced them in court. This is clearly insufficient to beat out the defendant's counterclaim.

[159] On the UMMC project, I accept the plaintiff's contention that notwithstanding the removal of the IBA as a vendor and the reduction of the contractual sum to RM19,311,257.67, this does not address the issue of

professional services rendered by the plaintiff, which the plaintiff is entitled to make claim for under the terms of the salient letter of award under Appendix B.

[160] On the issue of the non-delivery of certain equipment and components, Haliza accepted in cross-examination that it was UMMC who requested for the said items to be removed. She went on to concede that she did not know why the defendant made this claim but relied on the defendant's forensic accountant.

[161] On the issue that the plaintiff defaulted in providing maintenance of the lab information system, Haliza accepted that the obligation to provide such maintenance is an obligation of iSoft, rather than the plaintiff, and again she maintained that she did not understand why this claim was made.

[162] On the liquidated and ascertained damages claim by UMMC which the defendant maintains arose by virtue of the plaintiff's failure to deliver various components on time, it is relevant to take note of the matters set out by UMMC in support of its claim for LAD in the sum of RM1,553,096.23. A perusal of the same discloses that the delay was caused by iSoft and other vendors, rather than the plaintiff. The plaintiff's role in the project was primarily akin to that of a system integrator. As such it could not integrate the system until all components were available. Haliza confirmed that the defendant was considering making a claim against iSoft for failure to deliver some of the components.

[163] The defendant also makes claim for a sum of RM2,040,533.66 which, it maintains, the plaintiff failed to pay its suppliers and vendors, and which presumably the defendant had to make good. The defendant states that it has undertaken to pay another RM1,354,923 to this end. However in relation to this head of the counterclaim too, the defendant has failed to produce any supporting documentary evidence of payment such as copies of cheques or bank statements or invoices or receipts from such vendors and suppliers. In short there is simply no proof of such payment warranting the basis for the claim against the plaintiff. Again Haliza simply maintained that the records existed but had not been brought to court.

[164] There is also a claim for the estimated costs of maintenance in the sum of RM3,118.353 premised on the grounds that the plaintiff has failed to maintain after it terminated its services. Again in support of this claim there is a complete dearth of supporting documentation. It is merely a summary and is insufficient to provide proof of payment.

[165] In any event it is relevant that it is the defendant that unilaterally terminated the plaintiff's contract in the course of the UMMC project. The

plaintiff in fact vide letter dated 17 June 2010 highlighted the consequences of termination more particularly in relation to maintenance.

[166] Finally the defendant claim for a sum of RM1,220,485 for payments already made by the defendant to the plaintiff for implementation services in relation to both projects. In support the defendant merely annexes a summary of alleged payments. Again this is clearly insufficient to prove this limb of the defendant's counterclaim.

[167] In *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 the Federal Court stated, inter alia, as follows:

> … Before we embark upon a detailed consideration of the specific issues which arise for decision, there are three preliminary matters which, at the outset, require emphasis. Firstly that part of the judgment which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 at p 178:
>
> … plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying:
>
> This is what I have lost, I ask you to give me these damages.' They have to prove it …

(See also *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569).

[168] Given the foregoing, I am satisfied that the defendant has failed to prove its counterclaim in its entirety for the reasons stated above.

THE PLAINTIFF'S CLAIM

[169] I have in the course of this judgment analysed and considered in great detail the entirety of the evidence in support of both the plaintiff's case and the defence case. It appears to this dourt for the reasons I have stated throughout that the plaintiff has proved on a balance of probabilities that it provided the goods and services as billed and invoiced to the defendant. I have explained why I have concluded that based on the documents produced in court

comprising invoices with supporting documentation there is sufficient basis to accept the same as reflecting the work done and services provided by the plaintiff premised on the contractual relationship between the parties. The plaintiff's claim is entirely as premised on the letters of award, save for the issue of interest, which I do not award to the plaintiff in terms sought by it.

[170] Apart from the primary evidence in support of the plaintiff's claim, the numerous admissions arising throughout the course of the alleged dispute provide further basis for this court to accept the plaintiff's claim. In *KM Quarry Sdn Bhd v Ho Hup Construction Company Bhd* [2006] 7 MLJ 203; [2006] 1 LNS 297 it was held:

> … It is significant to observe that there has been no contemporaneous challenge by the defendant or the defendant's auditors on the above debt due and owing by the defendant to the plaintiff.
>
> Upon a true construction of the contents of these two contemporary documents, by way of correspondence between the parties herein, there can be no doubt that the defendant has in clear and unambiguous words confirmed and admitted the balance due from the defendant as shown in the defendant's records …

[171] In like manner in the instant case a perusal of entire series of documentation shows that there was no contemporaneous challenge that the plaintiff failed to perform or did not carry out specific services. The challenge if at all, which came later, sought to suggest that 'rationalisation' be conducted in respect of the accounts or that a discount be accorded to the defendant in relation to professional services and in respect of other services and projects undertaken and in respect of which reimbursements and out of pocket expenses were incurred.

[172] A further significant feature which supports the plaintiff's claim and fails to lend credence to the defendant's counterclaim is the fact that the ultimate third party customers who had employed the defendant, have paid in full (save for LAD claimed by UMMC) for works undertaken by the plaintiff. The contract between the plaintiff and the defendant envisages that all monies received by the defendant were to be remitted to the plaintiff on a back to back basis. This was not done, as evidenced by the testimony of PW2 from UMMC. There was simply no explanation from the defendant as to the whereabouts of these monies.

[173] In fact an objective bird's-eye view of the evidence and chronology of events discloses that the 'back to back' arrangement as envisaged in the letters of award issued by the defendant to the plaintiff worked with perfect precision until FSBM sold its shareholding held through Jaring Sekitar Sdn Bhd to Haliza. After this point, FSBM and accordingly the plaintiff failed to have any

direct nexus or powers of overseeing the operations of the defendant, save through Haliza and Prof Azman. Dato' Tan ceased to be a director and cheque signatory in 2007. In 2008 monies from clients ceased to be remitted back to the plaintiff as required under the contracts.

[174] Haliza and Prof Azman who held senior positions in FSBM, but who also now owned the entirety of the shareholding of the defendant clearly 'shifted' their loyalties, as it were, to the defendant. In breach of their duties owed to FSBM as both senior executive vice-president and executive director, they failed to disclose to FSBM or the plaintiff the quantum of monies received under the RDSLAM and UMMC projects. This was so, notwithstanding Haliza's admission that the defendant had been paid in full. Even after the conclusion of trial, it is not clear where these monies are.

[175] Taken in its entirety therefore the evidence shows that the plaintiff has not been paid in full for goods supplied and services performed. The numerous admissions estop the defendant from contending otherwise. In the course of its defence moreover, the defence witnesses were unable to point to any instances of non-performance of works or non-delivery of goods in relation to the plaintiff's claim. Apart from a general and bare denial in relation to the plaintiff's claim, the defendant did nothing. They sought to put the plaintiff to full proof of its claim. This the plaintiff did by providing detailed invoicing with supporting documentation. The summary of grievances in respect of these invoices were answered in full by the plaintiff as borne out by CBD21. The suggestion that the plaintiff has failed to prove its claim is therefore flawed.

[176] When this primary evidence is taken in conjunction with the conduct of the defendant's witnesses this conclusion is fortified, more particularly by the several admissions in writing in relation to audited accounts and financial statements.

[177] As I have indicated, I am unable to accept the defence contention that these admissions were qualified and therefore unacceptable. I have considered the admissions in the context in which they were made given the chronology of events and it appears to this court that the defendant at all times sought a discount from the plaintiff, rather than challenging the veracity of the claim as it now seeks to do.

[178] The fact that the defendant hired a forensic accountant and has since changed its mind in relation to the substantial amount of work done by the plaintiff is simply insufficient to rebut or meet the plaintiff's claim. In this context the forensic accountant is not an employee or agent of the defendant who implemented or has any personal knowledge of the projects. In other words he is not a witness of fact. As such any statements he makes amounts to opinion evidence which is irrelevant to the case here.

[179] In *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 the Federal Court had occasion to state as follows:

> … Unless the approach we have stated is adopted, a party to a contract who — having concluded his bargain — entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to virtual standstill.
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly …

[180] I have considered the defence and of the defendant and am satisfied that it affords no answer to the plaintiff's claim. One of the issues that remains to be addressed is that of whether the corporate veil between the plaintiff and FSBM Holdings ought to be lifted. The law is trite that the veil ought not to be lightly so lifted unless the circumstances warrant this. It has not shown that any of the exceptions to the doctrine of corporate personality have come into play, (see *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529).

[181] I have also explained why the counterclaim is misconceived and has no substantive basis. In all these circumstances I am satisfied that the plaintiff has proved its claim on a balance of probabilities and is therefore entitled to judgment as prayed for in the statement of claim save for interest which will prevail at 8%pa from the date of filing of the writ until the date of judgment. For avoidance of doubt the plaintiff is entitled to judgment against the defendant in the total sum comprising a total of RM1,164,765.29, RM49,781.62, RM12,320,350.56, RM82,829.69, RM20,000, RM243,997.23, RM13,872,338.13 and RM4,655,372.25 together with interest at 8%pa from the date of filing of the writ until the date of judgment as well as the costs of this action which amount to RM200,000.

Claim allowed.

Reported by Ashok Kumar